

Title 115

ETHICS COMMISSION

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**115-04-01-01. Definitions**

1. "Disqualifying Conflict of Interest" means a determination by a public official that a conflict of interest exists and recuses himself or herself and abstains from further action in the matter or that a Potential Conflict of Interest disclosed pursuant to this rule which the Neutral Decisionmaker has determined constitutes a direct and substantial personal or pecuniary interest.
2. A "Potential Conflict of Interest" means a Public Official as part of the Public Official's duties must make a decision or take action in a matter in which the Public Official has:

- a. Received a Gift;
  - b. A Significant Financial Interest; or
  - c. A Relationship in Private Capacity.
- 3. "Gift" means a gift not otherwise permitted under Article XIV of the North Dakota Constitution, N.D.C.C. Chapter 54-66, or N.D.A.C. Chapter 115-03-01.
- 4. "Immediate Family" means a Public Official's parent, sibling, spouse, grandparent, grandchild, or child by blood or adoption or a step-child.
- 5. "Neutral Decisionmaker" means individuals who do not have a Potential Conflict of Interest as follows:
  - a. If a Public Official with a Potential Conflict of Interest is a member of a legislative body, board, commission or committee, the remaining individuals who are members of the legislative body, board, commission or committee **may** be considered as the Neutral Decisionmaker(s);
  - b. If a Public Official with a Potential Conflict of Interest is an employee of the legislature, the Public Official's supervisor may be considered as the Neutral Decisionmaker(s);
  - c. If a Public Official with a Potential Conflict of Interest is a member of the Governor's cabinet, the Governor's designated ethics officer **may** be considered as the Neutral Decisionmaker(s); or
  - d. If the Public Official with a Potential Conflict of Interest is an appointed Public Official, the appointing official **may** be considered as the Neutral Decisionmaker(s).
  - e. **An agency, legislative body, board, commission or committee may by rule or policy designate a Neutral Decisionmaker(s) to receive disclosures and evaluate and decide on the potential recusal and disqualification.**

6. "Public Official" means any elected or appointed official of the North Dakota executive or legislative branches, including members of the Ethics Commission, members of the Governor's cabinet and employees of the legislative branch.
7. "Relationship in a Private Capacity" means a commitment, interest or relationship of the Public Official in a matter involving the Public Official's immediate family, individual's residing in the Public Official's household, the Public Official's employer or employer of the Public Official's immediate family, or individuals with whom the Public Official has a substantial and continuous business relationship.
8. "Significant Financial Interest" means an in-kind or monetary interest, or its equivalent, not shared by the general public, however, does not include investments in a diversified mutual fund or participation in a public employee benefits plan.

**115-04-01-02 Disclosure of Potential Conflict of Interests**

1. When a matter comes before a Public Official and the Public Official has a Potential Conflict of Interest, the Public Official must disclose the Potential Conflict of Interest to the appropriate Neutral Decisionmaker. The disclosure of Potential Conflict of Interest must be made prior to the Public Official taking any action or making any decision in the matter. The disclosure must provide sufficient information concerning the matter and the Public Official's Potential Conflict of Interest. The Neutral Decisionmaker shall determine if the disclosure shall be made verbally or in writing. The public Official shall take no action in the matter until the Neutral Decisionmaker has made a determination on the Potential Conflict of Interest.
2. In an emergency or other exigent circumstances where time is of the essence, and a Public Official is not permitted or is otherwise unable to abstain from action in connection with the matter, the Public Official must disclose the Potential Conflict of Interest and the action with the Neutral

Decisionmaker in the manner requested by the Neutral Decisionmaker. The disclosure must occur within 7 days of the Public Official's action in the matter.

3. Upon the completion of the required disclosure of a Potential Conflict of Interest, the Public Official may voluntarily recuse himself and abstain from further action in the matter. If the Public Official voluntarily recuses himself and abstains from further action in the matter, the Neutral Decisionmaker shall make take the decision or take action in the matter or designate an alternative Public Official to take action in the matter.

**115-04-01-03 Neutral Decisionmaker(s) Review of Potential Conflict Disclosures, Decision and Action**

1. Upon receipt of a Public Official's disclosure of a Potential Conflict of Interest, the Neutral Decisionmaker shall review the disclosure, may request further information from the Public Official regarding the disclosure, and shall determine if the disclosed Potential Conflict of Interest constitutes a Disqualifying Conflict of Interest.
2. Upon completion of the review of the Potential Conflict of Interest, the Neutral Decisionmaker shall communicate to the Public Official one of the following:
  - a. If the Neutral Decisionmaker concludes that the Potential Conflict of Interest does not constitute a Disqualifying Conflict of Interest, the Public Official may participate in the matter.
  - b. If the Neutral Decisionmaker concludes that the Potential Conflict of Interest does constitutes a Disqualifying Conflict of Interest, the Public Official shall recuse himself and abstain from participating in the matter.
3. If under this rule, a Public Official is required to recuse himself and abstain from further action in a matter, further action or decisions in the matter shall be made by the appropriate Neutral

Decisionmaker unless a different procedure is required by applicable law or rule in which case the decision or action shall be taken by the Public Official, agency, commission, board or committee designated by law or rule.

4. The Neutral Decisionmaker shall comply with the requirements of the open meetings laws in their consideration and review of the Potential Conflict of Interest. During any discussion of a Potential Conflict of Interest, upon request by the Neutral Decisionmaker, the Public Official may provide additional information regarding the Potential Conflict of Interest and the matter in question. Where the North Dakota open meetings laws and regulations apply, the Public Official may not be asked to leave the discussion of the Potential Conflict of Interest, however, the disclosing Public Official may voluntarily leave the meeting at which the discussion occurs. If the Neutral Decisionmaker is a group of individuals in which the Public Official is a member, the Public Official may not vote on the issue of whether a Potential Conflict of Interest constitutes a Disqualifying Conflict of Interest. The Public Official may not be counted for purposes of determining whether a quorum is present. Any quorum requirement established under statute, ordinance or rule shall be reduced as though the Public Official were not a member of the group of individuals that constitutes the Neutral Decisionmaker.
5. The following standards shall guide the review and decision of the Neutral Decisionmaker with respect to any Public Official's Potential Conflict of Interest:
  - a. Appropriate weight and proper deference must be given to the requirement that a Public Official perform the duties of elected or appointed office, including the duty to vote or otherwise act upon a matter, provided the Public Official has properly disclosed the Potential Conflict of Interest as required by this rule.
  - b. A decision that requires a Public Official to recuse or abstain from further action or decision in a matter should only occur in cases where the independence of judgement

of a reasonable person in the Public Official's situation would be materially affected by the disclosed Potential Conflict of Interest.

- c. The review of a Potential Conflict of Interest and any decision that would require a Public Official to recuse himself or abstain from further involvement in a matter shall consider any applicable North Dakota law which precludes the Public Official from recusal or abstention in the matter.
- d. It is presumed that a Public Official does not have a Disqualifying Conflict of Interest if the Public Official would not derive any personal benefit which is greater than that accruing to any other member of the general public or any general business, profession, occupation, or group affected by the matter.

#### **115-04-01-04 Quasi-Judicial Proceedings**

- 1. Article XIV, Section 2(5) of the North Dakota Constitution establishes a requirement that Public Officials who are directors, officers, commissioners, heads, or other executives of agencies avoid the appearance of bias in any Quasi-Judicial proceeding. This section 115-04-01-04 is applicable to Public Officials who are involved in Quasi-Judicial proceedings.
- 2. Definitions applicable to Quasi-Judicial Proceedings:
  - a. Definitions set forth in Section 115-04-01-01 are applicable to this section unless a different defined term is set forth in this section.
  - b. "Appearance of bias to a reasonable person" means that the interest in question would create in reasonable minds a perception that the Public Official's ability to carry out Quasi-Judicial responsibilities impartially and without bias is impaired.
  - c. "Campaign Monetary or In-Kind Support" means all campaign contributions of every kind and type whatsoever, whether in the form of cash, goods, services, or other form of contribution, and whether donated directly to the Public Official's campaign or donated to

any other person or entity for the purpose of supporting the Public Official's election to any office.

- d. "Quasi-Judicial" means the Public Official is called upon to perform a judicial act when the Public Official is not a member of the North Dakota judiciary. This includes administrative hearings, generally, and administrative hearings conducted pursuant to N.D.C.C. Chapter 28-32 where the final decisionmaker is the Public Official.

- 3. When a matter comes before a Public Official as part of a Quasi-Judicial proceeding, the Public Official must disclose any Potential Conflict of Interest and Campaign Monetary or In-Kind Support. The disclosure must be made to a Neutral Decisionmaker prior to the Public Official having any further involvement in a Quasi-Judicial proceeding. The Public Official shall have no involvement or take any further action in a Quasi-Judicial proceeding until a decision has been made by the Neutral Decisionmaker. In addition, the Public Official must disclose the Potential Conflict of Interest and/or Campaign Monetary or In-Kind Support to the parties to the Quasi-Judicial proceeding.
- 4. The Public Official shall disclose the Potential Conflict of Interest and any Campaign Monetary or In-Kind Support to a Neutral Decisionmaker in the manner required by Section 115-04-01-02(1)(a). As provided in Section 115-04-01-02(3), the Public Official may voluntarily recuse himself from any further involvement in a Quasi-Judicial proceeding.
- 5. The Neutral Decisionmaker shall follow the procedures set forth in Section 115-04-01-03 in the review of any Potential Conflict of Interest and/or Campaign Monetary or In-Kind Support. In addition, with respect to the review of any Campaign or In-Kind Support, the Neutral Decisionmaker, the following factors should be considered to determine whether Campaign Monetary or In-Kind Support creates an appearance of bias to a reasonable person:
  - a. The size of the contribution;
  - b. The degree of involvement in the campaign;

- c. Whether the contribution is within the current or immediately preceding election cycle;
  - d. The issues involved in the Quasi-Judicial proceeding; and,
  - e. Other factors known to the Public Official that creates an appearance of bias to a reasonable person.
6. Upon completion of the review of Potential Conflict of Interest and/or Campaign Monetary or In-Kind Support, the Neutral Decisionmaker shall communicate to the Public Official one of the following:
- a. If the Neutral Decisionmaker concludes that the Public Official has a Disqualifying Conflict of Interest or has received Campaign Monetary or In-Kind Support that creates the appearance of bias to a reasonable person, the Public Official shall recuse himself from any further involvement in the Quasi-Judicial proceeding.
  - b. If the Neutral Decisionmaker concludes that the Public Official does not have a Disqualifying Conflict of Interest or has not received a Campaign Monetary or In-Kind Support that creates the appearance of bias to a reasonable person, the Public Official may participate in the Quasi-Judicial proceeding.
  - c. After disclosure to the parties involved in a Quasi-Judicial proceeding of a Public Official's Potential Conflict of Interest and/or Campaign Monetary or In-Kind Support, all parties to the Quasi-Judicial proceeding may voluntarily consent, in writing, to the Public Official's continued involvement in the Quasi-Judicial proceeding. The written consent must be provided to the Neutral Decisionmaker to whom the disclosure was made. Notwithstanding the written consent of the parties, the Neutral Decisionmaker may conclude that the Public Official must still recuse himself and abstain from any further involvement in the Quasi-Judicial proceeding.



7. In Quasi-Judicial proceedings in which a Public Official is recused or must abstain from further involvement in the proceeding, the department, agency, board, commission or other public entity involved in the Quasi-Judicial proceeding shall determine whether a substitute is required to act in the place of the Public Official. The procedure to assign a substitute for the Public Official shall be determined by North Dakota law or rule. In the absence of applicable North Dakota law or rule, the department, agency, board, commission or public entity may adopt policies consistent with this rule to address vacancies caused by a Public Officials recusal or abstention in any Quasi-Judicial proceeding.

**115-04-01-05 Adoption of More Restrictive Rules**

Any agency, office, commission, board, or entity subject to these rules may adopt conflict of interest rules that are more restrictive but may not adopt conflict of interest rules that are less restrictive.